1358

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 101.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOROUGH OF NEW HOPE.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

FILED MAY 20, 1901.

(18,173.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 24, 1902.

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1 In the Superior Court of Pennsylvania, Sitting at Philadelphia.

Among the records and proceedings of the superior court of Pennsylvania sitting at Philadelphia, *inter alia*, the following is thus contained:

In the Superior Court of Pennsylvania, of October Term, 1900.

THE BOROUGH OF NEW HOPE, Appellee,
v.
THE WESTERN UNION TELEGRAPH CO., Appellant. } No. 101.

Petition for Writ of Error.

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States:

The petition of the Western Union Telegraph Company respectfully represents:

That your petitioner brought suit into the superior court of Pennsylvania, for the eastern district, to October term, 1900 No. 101, by writ of certiorari to an appeal from a decree of the court of common pleas of Bucks county, of January term 1899, No. 11, in which suit in said superior court your petitioner was appellant and defendant in the said court of common pleas; and The Borough of New Hope was appellee in said superior court and plaintiff in said court of common pleas.

2 The claim of the plaintiff, said Borough of New Hope, against the defendant was for license fees for four years from 1895 to 1898 (inclusive) sought to be imposed upon the defendant by a certain ordinance of the borough of New Hope passed upon the tenth day of July 1894, by which it was provided that for the maintenance of each and every telegraph, telephone and electric light pole within the limits of the said borough the owner or lessee thereof should pay to the borough treasurer an annual license fee of one dollar, and for the maintenance of each and every mile of telegraph, telephone and electric light wire two dollars and a half. Claim was made in the suit for such license fees upon seventy-five poles and twenty-five miles of wire for the years aforesaid. The poles and wires situate in the borough of New Hope, and upon which these license fees were sought to be imposed, were used by the defendant solely for the transmission of telegraphic messages between the different States of the United States and for cable messages to be transmitted from the United States to other countries, and no local business arising in said borough of New Hope was carried on by the defendant, and no office was maintained by it in said borough. There was no cost or expense imposed upon the said borough, as was affirmatively shown on the trial of the cause; nor was there any supervision or regulation whatsoever by the said

borough of said poles and wires. The defendant alleged in its affidavit of defence that under these circumstances there was no
3 power in the borough of New Hope to levy such a license tax, by ordinance or otherwise, or any authority for so doing, since the defendant in the transaction of the business carried on by means of said poles and wires was engaged in the transaction of commerce between the States and between the United States and foreign countries, and that the attempted imposition of the license fees in question was in fact a regulation of commerce between the States, and that the ordinance was therefore void.

The facts above outlined were set forth upon the trial and in the testimony, and upon said trial the court was requested to charge as follows:

"1. It appears from the uncontradicted evidence in this case that the poles and wires in the borough of New Hope, to recover for the charges upon which this suit is brought, form a part of the system of poles and wires of the defendant company extending into and through the other States and Territories of the United States over and along which system of poles and wires including therein the said poles and wires in the borough of New Hope, communication by electricity is carried on and messages transmitted by said defendant company to and from citizens from other States and to and from such citizens of other States, from and to citizens of the State of Pennsylvania, which said business is commerce between the States within the meaning of the Constitution of the United States; therefore the borough of New Hope has no right to impose any charge for the privilege of erecting and maintaining said poles and
4 wires in said borough, except only such sum as will reasonably cover and reimburse to it the expenses to which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fee sued for in this case exceed said sum, your verdict should be for the defendant.

2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company; and as said borough is without the power to exact any charge for the maintenance of said telegraph poles and wires the ordinance of the said borough of July 10th, 1894, sued on in this case, is void, and the verdict of the jury should be for the defendant."

The trial judge affirmed the first of these points and refused the second.

The verdict of the jury upon the said trial was in favor of the plaintiff for the sum of three hundred and seventy-seven and forty-hundredths ($377.40) dollars, which was the full amount claimed, and judgment was duly entered thereon.

From this judgment an appeal was taken to the superior court of Pennsylvania, for the eastern district, of October term 1900, No. 101. Upon the appeal the answer of the judge to the second point, as well as his refusal of the fourth point, which was as follows:

"Under all the evidence in this case, the verdict of the jury should be for the defendant,"

5 were, *inter alia*, assigned as error, and the said superior court by an opinion filed therein upon the 14th day of February, A. D. 1901, copy of which opinion is hereunto annexed, duly affirmed said judgment.

By the statutes of the State of Pennsylvania the said superior court is given exclusive and final appellate jurisdiction of "any action, claim, distribution, or dispute of any kind in the common pleas, at law or in equity, whether originating therein or reaching that court by appeal or certiorari from a justice of the peace or alderman or magistrate, if the subject of the controversy be either money, chattels, real or personal, or the possession of or title to real property, and if also the amount or value thereof really in controversy be not greater than fifteen hundred dollars, exclusive of costs, and if also the action be not brought, authorized or defended by the attorney general in his official capacity."

Provided, "nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court, there may still be an appeal from its judgment to the supreme court:

First. If the jurisdiction of the superior court is in issue; or

Second. If the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States; or

6 Third. If the case involves the construction or application of the constitution of Pennsylvania; or

Fourth. If the appeal to the supreme court be specially allowed by the superior court itself or by any one justice of the supreme court."

That by the construction of this act by the supreme court of the State of Pennsylvania, and the rules and practice of said court, no appeal is allowed to be taken from said superior court to said supreme court in any case, unless the same be allowed by the said supreme court upon presentation to it of a petition duly praying for the allowance thereof.

That after the said opinion of the superior court affirming the judgment of the said court of common pleas had been filed, your petitioner duly presented its petition to the supreme court of Pennsylvania asking for the allowance of an appeal from the said judgment of the superior court and for a writ of certiorari to be issued in said cause, but the prayer of the petitioner was refused by the said supreme court and the record of said cause remains and is in said superior court of Pennsylvania.

That the said judgment of the said superior court of Pennsylvania is therefore and has become the judgment of the highest court of record of the Commonwealth of Pennsylvania in which under the laws of said State, a decision can be had.

That the judgment of the said court is final.

7 That the right, title, privilege and immunity claimed by your petitioner, defendant and appellant aforesaid, were claimed under the Constitution of the United States, article I, section 8, paragraph 3, which provides that Congress shall have "power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes," all which appears of record; that the question involved was the power of the Borough of New Hope to impose said license fees and taxes by reason of the provisions of article 1, section 8, paragraph 3, of the Constitution of the United States as aforesaid, and whether or not said ordinance was a regulation of commerce between the States, which the said Borough of New Hope had no power to enact and which was in conflict with the provisions of the Constitution of the United States.

Your petitioner further avers that it denied in this case the right of the Borough of New Hope to impose any license fees whatsoever upon its poles and wires because the same was in fact a regulation of commerce between the States, and their imposition is not justified by any police power existing, or claimed to exist, in the said Borough of New Hope, and that said police power affords no authority or right to impose said fees or any fees upon said poles and wires.

That the decision and judgment of the superior court of Pennsylvania aforesaid was against the right, title, privilege and immunity so claimed.

8 Your petitioner therefore prays for the allowance of a writ of error to the superior court of Pennsylvania, in order that the said judgment of the superior court of Pennsylvania may be re-examined and reversed, or affirmed, in the Supreme Court of the United States.

And your petitioner will ever pray, etc.

THE WESTERN UNION TELEGRAPH COMPANY,
By THOS. F. CLARK, *Vice-President.*

[SEAL.] A. R. BREWER, *Secretary.*

STATE OF NEW YORK, } *ss:*
County of New York, }

Thomas F. Clark being duly sworn according to law, deposes and says that he is the vice-president of The Western Union Telegraph Company, the above-named petitioner, and on behalf of the said company says that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

THOS. F. CLARK.

Sworn to and subscribed before me this 18th day of March, A. D. 1901.

[SEAL.] E. A. MACCLEAN,
Notary Public, N. Y. Co., No. 1.

9 In the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE
v.
WESTERN UNION TELEGRAPH CO. } No. 101, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks Co.

Filed Feb. 14, 1901.

Per Curiam:

It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of
10 discretion on the part of the municipal authorities: W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C. 39; S. C. 11 Cent. Rep. 102; Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Chester *v.* P. R. & P. Tel. Co., 148 Pa. 120; Chester *v.* W. U. Tel. Co., 154 Pa. 466; Philadelphia *v.* Am. Union Tel. Co., 167 Pa. 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct. 620; North Braddock *v.* Central etc. Tel. Co., 11 Pa. Superior Ct., 24; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct. 31. See also McKeesport *v.* McKeesport, etc. R'y Co., 2 Pa. Superior Ct. 242; North Braddock *v.* Second Ave. Tr. Co., 8 Pa Superior Ct. 233; Lansdowne *v.* Delaware etc. Electric R'y Co., 9 Pa. Superior Ct. 621; and Taylor *v.* C. P. Tel. etc. Co., 8 Pa. Dist. Rep. 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable
11 rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led *by* the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being

undisputed, we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

STATE OF PENNSYLVANIA, } ss:
Philadelphia, }

I, Charles S. Greene, prothonotary of the superior court of Pennsylvania, do hereby certify that the above and foregoing is a true copy of the opinion in the above-entitled cause, so full and entire as appears of record in said court.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Philadelphia this 15th day of February, A. D. 1901.

CHAS. S. GREENE, *Prothonotary.*

12 Endorsement: 101. October T. 1900. Superior court of Pennsylvania The Borough of New Hope, appellee, *v.* The Western Union Telegraph Co., appellants. Petition for writ of error. And now, to wit, April 22d 1901, citation awarded and writ of error allowed by me. George Shiras, Jr. associate justice of the Supreme Ct. of U. S. Read & Pettit Filed April 23, 1901. In superior court.

13 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United Statesof America to the honorable the judges of the superior court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Western Union Telegraph Company, appellant, and The Borough of New Hope, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Con-
14 stitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a man

fest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

15 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Borough of New Hope, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the superior court of the State of Pennsylvania, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 22d day of April, in the year of our Lord one thousand nine hundred and one.

GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

15½ April 25, 1901.—Service of the within citation is hereby accepted.

WM. C. RYAN,
Att'y for Defendant in Error.

16 *Bond Surwrit of Error to Supreme Court of United States.*

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
THE BOROUGH OF NEW HOPE, Defendant in Error.

Know all men by these presents that the Western Union Telegraph Company as principal and W. B. Gill of Philadelphia as surety are held and firmly bound unto the Borough of New Hope in the full and just sum of seven hundred and fifty-four and eighty-hundredths ($754.80) dollars, to be paid to the said The Borough of New Hope, its certain attorney, successors or assigns; to which payment well and truly to be made we do bind ourselves, and our heirs, executors, administrators, successors or assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of March, anno Domini one thousand nine hundred and one.

Whereas, lately, in the court of common pleas, in and for the county of Bucks and State of Pennsylvania, judgment was entered against the Western Union Telegraph Company at the suit of the Borough of New Hope, of January term, 1899, No. 11, which judgment was afterwards affirmed by the superior court of the
17 State of Pennsylvania in a certain plea and suit in said court, of October term 1900, No. 101. And the said The Western Union Telegraph Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above-entitled action; having filed a copy thereof in the office of the prothonotary of said court and a citation directed to the said The Borough of New Hope citing and admonishing it to be and appear in the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such: that if the said The Western Union Telegraph Company shall prosecute their said writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void, or else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By THOS. F. CLARK, *Vice-President.*
[SEAL.] A. R. BREWER, *Secretary.*
W. B. GILL. [SEAL.]

Sealed and delivered in the presence of
E. A. MACCLEAN.

Witness as to W. B. Gill,
J. M. PEOPLES.

Ap'l 22d, 1901.—The foregoing bond is approved.
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Ct. of U. S.

18 Endorsement: 101 October T. 1900. Superior court of Pennsylvania. The Borough of New Hope, appellee, *v.* The Western Union Telegraph Co., appellant. Bond and approval of surety. Filed April 23, 1901. In superior court. Read & Pettit.

19 *Appearance Docket.*

Superior Court, October Term, 1900.

Docket Entries.

THE BOROUGH OF NEW HOPE, Plaintiff,
v.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } 101.

Robert M. Yardley.
Read & Pettit.

Appeal of defendant.

C. P. 11, Jan'y term, 1899, from the judgment.

Appeal from the court of common pleas of the county of Bucks.

Filed April 24, 1900.
Eo die.—Certiorari exit ret-ble the third Monday of November 1900.
July 26, 1900.—Record returned and filed.
September 27, 1900.—Assignments of error filed.
November 20, 1900.—Argued.
February 14, 1901.—Judgment affirmed.
Per curiam.

In Supreme Court.

Filed Feb'y 25, 1901.

Petition of Western Union Telegraph Co. for allowance of an appeal from the superior court to the supreme court on motion of Read & Pettit, Esqs.
March 7, 1901.—Appeal refused.
Per curiam.
20 March 20, 1901.—Order by Rice, P. J. to hold the record until further order filed.
April 23rd, 1901.—Petition for writ of error to the Supreme Court of the United States and allowance of citation and writ of error by George Shiras, Jr., associate justice of Supreme Court of the United States.
Eo die.—Bond and approval of surety by Hon. George Shiras, Jr. filed.
Eo die.—Writ of error to the Supreme Court of the United States returnable within thirty days from April 22nd 1901 brought into office.
May 13, 1901.—Citation with service brought into office.
Eo die.—Assignments of error to the Supreme Court of the United States brought into office.

21 *Appeal and Affidavit.*

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

Court of Common Pleas of the County of Bucks.

THE BOROUGH OF NEW HOPE, Plaintiff,
v.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.
} January Term, 1899, No. 11.

Enter appeal on behalf of The Western Union Telegraph Co. defendant, from judgment of the court of common pleas of the county of Bucks.

ROBERT M. YARDLEY,
READ & PETTIT,
Att'ys for Appellant.

To Charles S. Greene, proth'y sup. ct.

COUNTY OF PHILADELPHIA, *ss:*

A. G. Saylor, manager of The Western Union Telegraph Co., appellant, being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellant believes it has suffered injustice by the judgment from which it appeals.

A. G. SAYLOR,
Manager Western Union Tel. Co.

Sworn to and subscribed this 24th day of April, A. D. 1900, before me

LOUIS B. RUNK,
Notary Public.

22 Endorsement: No. 101 October term, 1900. Superior court of Pennsylvania. Sitting at Philadelphia. 530 The Borough of New Hope *v.* The Western Union Telegraph Co., appellant. Appeal and affidavit. Filed Apr. 24, 1900. In the superior court. Rob't M. Yardley Read & Pettit attorney- for appellant.

Præcipe for Certiorari.

In the Superior Court of Pennsylvania, Sitting at Philadelphia.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant. No. 11.

Certiorari to the court of common pleas of the county of Bucks, of January term, 1899.

Issue certiorari to the court of common pleas of the county of Bucks to bring up record and proceedings in a certain action in said court, No. 11 January term, 1899 wherein The Borough of New

Hope was plaintiff and The Western Union Telegraph Co. defendant.

Returnable to next term, *sec. reg.*

To Charles S. Greene, prothonotary, superior court—sitting at Philadelphia.

ROBERT M. YARDLEY,
READ & PETTIT,
Attorney- for Appellant.

23 Endorsement: No. 101 October term, 1900. Superior court of Pennsylvania, sitting at Philadelphia. The Borough of New Hope *v.* The Western Union Telegraph Co., appellant. Præcipe for certiorari Filed April 24, 1900. In the superior court. Rob't M. Yardley Read & Pettit attorney- for appellant.

Record of the Court of Common Pleas of the County of Bucks.

COMMONWEALTH OF PENNSYLVANIA, *Bucks County,* } *ss:*

Among the records and proceedings of the court of common pleas in and for the county of Bucks, in the State of Pennsylvania, it is, *inter alia,* thus contained:

Number 37.

Appearance Docket Entries.

Of January Term, 1899. No. 11.

DEC. 22.

THE BOROUGH OF NEW HOPE *v.* THE WESTERN UNION TELEGRAPH COMPANY. } 11. Action of Assumpsit.

William C. Ryan.
Robert M. Yardley.

December 22nd, 1898.—Statement of plaintiff's claim filed.
January 3rd, 1899.—Defendant's affidavit of defense filed.

Costs.

Sheriff	$5.70
1 Sup. P.	.60
24 Proth'y	3.50
Att'y	3.00
T. & W.	2.00
Cr.	.13
Dis.	.25
Verdict	4.00
Judg.	1.25
	$20.43

To the hon. the judge within named:

December 23rd, 1898.—Summoned The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy of the within writ with A. G. Saylor, manager of said defendant company at the superintendant's office at 10th and Chestnut streets Philadelphia and informing him of the contents thereof.

So answers

IRVIN AARON, *Sheriff.*

I Warren S. Ely, do certify that I served the plaintiff's statement of demand in the within-mentioned suit on The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy with A. G. Saylor manager of said defendant company at the superintendant's office, at 10th and Chestnut streets Philadelphia and informing him of the contents thereof on December 23rd 1898.

WARREN S. ELY.

Affirmed and subscribed before me this 24th day of December A. D. 1898.

EMIL W. HARING,
Prothonotary.

March 16th, A. D. 1899.—The plaintiff by its attorney moves for the entry of a plea.

April 3rd, 1899.—Proof of notice of entry of a motion for a plea filed.

25 *Ei die.*—Plea of non-assumpsit entered by prothonotary.

April 17th, 1899.—Continued.

October 17th, A. D. 1899.—Jury empaneled and sworn.

Eo die.—Verdict in favor of the plaintiff for the sum of $377.40 *dollars* and six cents costs.

October 19th, 1899.—Motion and reasons for new trial filed.

October 27th, 1899.—Notes of testimony filed.

December 5th, A. D. 1899.—Argued and *C. A. V.*

And now to wit: February 26th 1900 the rule is discharged and judgment for plaintiff.

HARMAN YERKES,
President Judge.

March 8th, 1900.—Received of William C. Ryan Esq. $4.00 *dollars* verdict fee.

March 8th, A. D. 1900.—Judgment entered. Taxed to docket No. 33 page 252.

April 26th, 1900.—Certiorari from superior court came to hand.

June 12th, A. D. 1900.—Bond of appellant filed.

Præcipe for Summons.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH CO. } No. 11, January Term, 1899. Action of Assumpsit.

26 Emil W. Haring, Esq., prothonotary:

Issue summons in action of assumpsit as above. Returnable next term.

WM. C. RYAN,
Att'y for Plaintiff.

Dec. 22, 1898.

Endorsement: No. 11 January term 1899. In the court of common pleas of Bucks county. Borough of New Hope *v.* Western Union Tel. Company. Præcipe for summons. Filed Dec. 22, 1898. Wm. C. Ryan, att'y.

Action of Assumpsit.

BUCKS COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Bucks, Greeting:

We command you, that you summon the Western Union Telegraph Company so that it be and appear before our court of common pleas, to be holden at Doylestown, in and for the said county, on the second day of January next, there to answer the Borough of New Hope in an action of assumpsit. And have you then there this writ.

27 Witness, the Honorable Harman Yerkes, president of our said court at Doylestown, this twenty-second day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] EMIL W. HARING,
Prothonotary.

Proof of Service of Summons.

To the hon. the judge within named:

December 23rd 1898 summoned The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy of the within writ with A. G. Saylor manager of said defendant company, at the superintendent's office at 10th and Chestnut streets Philadelphia and informing him of the contents thereof.

So answers

IRVIN AARON, *Sheriff.*

I, Warren S. Ely do hereby certify that I served the plaintiff's statement of demand in the within-mentioned suit on The Western Union Telegraph Company the within-named defendant by leaving a true and attested copy with A. G. Saylor manager of said defendant company at the superintendant's office at 10th and Chestnut streets Philadelphia and informing him of the contents
28 thereof on December 23rd A. D. 1898.

WARREN S. ELY.

Affirmed and subscribed before me this 24th day of December A. D. 1898.

EMIL W. HARING, *Proth'y.*

Endorsement: No. 11 January term 1899. The Borough of New Hope *v.* The Western Union Telegraph Company. Action of assumpsit.

To the defendant within named:

You are hereby notified that if a copy of the statement of plaintiff's demand is served on you not less than fifteen days before the return day of this writ, which will be the second day of January 1899 it will be your duty to file an affidavit of defense, on or before the said return day; or, if notice that plaintiff's statement of demand has been filed is served on you, on or after the said return day, it will be your duty to file an affidavit of defense within fifteen days after service on you of said notice.

EMIL W. HARING,
Prothonotary.
WM. C. RYAN, *Attorney.*

Sheriff's costs $5.70.

29 *Plaintiff's Statement.*

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
} No. 11, January Term, 1899. Action of Assumpsit.

Plaintiff's statement of claim.

The plaintiff claims of the defendant the sum of $500, being the sum total of charges due to the said plaintiff by the defendant, according to the following specifications, with interest from the first day of October of each year hereinafter stated.

The proper authorities of the borough of New Hope, on the tenth day of July, A. D. 1894, duly passed an ordinance entitled "An ordinance for the regulation of the introduction and maintenance of telegraph, telephone and electric light poles, and wires into and in the borough of New Hope," a copy of which is hereto attached, marked Exhibit "A" that the same may be taken as a part of this statement.

The said defendant prior to and since the first day of October, A. D. 1895, has maintained and used telegraph poles and wires within the corporate limits of said borough as follows:

In the year beginning October 1, 1895, 75 poles, at $1.....	$75
In the year beginning October 1, 1896, 75 poles, at $1...	75
30 In the year beginning October 1, 1897, 75 poles, at $1...	75
In the year beginning October 1, 1898, 75 poles, at $1...	75
In the year beginning Oct. 1, 1895, 20 miles wire, $2.50.....	50
In the year beginning Oct. 1, 1896, 20 miles wire, $2.50.....	50
In the year beginning Oct. 1, 1897, 20 miles wire, $2.50.....	50
In the year beginning Oct. 1, 1898, 20 miles wire, $2.50..	50
	$500

By reason whereof the said defendant by force of said ordinance is indebted to the said plaintiff in the said sum of $500 with interest as aforesaid, wherefore said plaintiff brings its suit.

WM. C. RYAN,
Att'y for Plaintiff.

EXHIBIT A.

An ordinance for the regulation of the introduction and maintenance of telegraph, telephone and electric light poles and wires into and in the borough of New Hope.

SECTION 1. Be it ordained and enacted by the town council of the borough of New Hope, That before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric light wires shall be run, along, over or under any street, lane or alley of the borough of New Hope, permission to do so shall be first obtained from the town council, by the corporation, firm or individual who proposes to erect such poles and run such wires, such permission to be granted by ordinance only.

SECTION 2. That all telegraph, telephone and electric light poles, now erected or to be erected hereafter, in the borough of New
31 Hope, which are or shall be owned or leased by any corporation, firm or individual, shall be designated by the names or initials of such owner of lessees, and each of said poles shall have a distinctive number, together with the name or initials of such owner or lessee, legibly marked thereon. On or before the 1st day of October next and annually thereafter, such owner or lessee shall make application to the burgess for a license to maintain the poles and wires theretofore erected, for the ensuing year, specifying the poles by their designation of name or initials and number, as provided by this section, and wires by the streets along, over or under which they run. The burgess shall, upon the production to him, by the applicant, of the receipt of the borough treasurer for the license fees hereinafter provided for, issue a license, which shall authorize the maintenance of the poles and wires designated in the application, for the period of one year from that date.

SECTION 3. That, for the maintenance of each and every telegraph, telephone and electric light pole within the limits of said borough of New Hope, the owner or lessee thereof shall pay to the borough treasurer an annual license fee of one dollar; and for the maintenance of each and every mile of telegraph, telephone and electric light wire within the limits of the said borough, the owner or lessee thereof shall pay to the borough treasurer for the use of said borough an annual license fee of two dollars and fifty cents.

32 SECTION 4. That any corporation, firm or individual, who shall fail to comply with the requirements of this ordinance, shall be subjected to a penalty of $100.00 for each and every offense, to be recovered in like manner as debts for penalties of like amount are recoverable.

By order of council.

C. C. B. JOHN, *Burgess.*

Attest: CHARLES HAIGH, *Secretary.*

New Hope, Pa., July 10th, 1894.

Endorsement: No. 11 Jan'y term 1899. In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Company. Action of assumpsit. Plaintiff's statement Filed Dec. 22nd 1898. Wm. C. Ryan. att'y.

Affidavit of Defence.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE *v.* THE WESTERN UNION TEL. CO. } No. 11, January Term, 1899. Action of Assumpsit.

33 Affidavit of defence.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

A. G. Saylor, being duly sworn according to law, deposes and says, that he is the manager of The Western Union Telegraph Company, the defendant above named, within the district including the county of Bucks in the State of Pennsylvania; and that the defendant has a good and legal defence to the whole of the plaintiff's claim in the above-stated case of the following nature and character, to wit:

The defendant is a corporation duly created, under and by virtue of the laws of the State of New York, on or about the first day of April, A. D. 1851, for the purpose of erecting, maintaining and operating lines of telegraph and with power to construct, maintain and operate such lines in and through the various States and Territories of the United States. On or about the fifth day of June, A. D. 1867 the said defendant did duly accept the provisions of the act of Congress approved the 24th day of July 1866, entitled, "An act to

aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes;" and on or about the eighth day of June, A. D. 1867 did duly file its written acceptance of the restrictions and obligations required by the said act of Congress with the Postmaster General of the United States.

Under and by virtue of the power and authority aforesaid, as well as under and by virtue of the laws of the Commonwealth of
34 Pennsylvania it thereunto enabling, the said defendant during all the time for which the said alleged license fees are sought to be recovered, to wit, during the years 1895, 1896, 1897 and 1898, and still does, lawfully own, control and maintain lines of telegraph within the State of Pennsylvania of which the wires and poles to recover for the license fees upon which this suit is brought and erected and maintained within the limits of the borough of New Hope form a part, connecting with and forming parts of lines of telegraph extending between the various States of the United States and the Territories thereof for the communication of intelligence by electricity, in the erection and construction of which said lines of telegraph divers large sums of money have been expended.

Deponent avers that said poles and wires, to recover for the license fees upon which this suit is brought, were, during all the time aforesaid, maintained, used and operated by it for the transmission of intelligence by electricity to and from said borough of New Hope from and to other cities and States without the State of Pennsylvania and situate within the other States and Territories of the United States, and to and from other cities and places outside the State of Pennsylvania through the said borough of New Hope, and also from and to other countries beyond the limits of the United States; and that during all the time aforesaid said defendant was and still is daily in the receipt of messages from citizens of the said bor-
35 ough which they are by law obliged to and do transmit by telegraph over the said lines to other persons in the State of Pennsylvania and residing in the other States of the United States or in foreign countries; and are also in receipt of like messages from persons in other States and countries addressed to citizens in the said borough of New Hope, which by law they are obliged to and do receive, transmit and deliver to the said citizens of the said borough.

Deponent avers that the said alleged license fees so sought to be imposed by the said ordinance of the borough of New Hope are so imposed by it for the purpose of producing and would produce revenue to the borough of New Hope, not only over and above the cost of regulating and supervising the said telegraph poles and wires and the cost of issuing the licenses therefor, and all the ordinary and necessary expenses thereby imposed upon the said borough, but also over and above all extraordinary expenses, damages and costs arising from liability imposed upon the borough by reason of the erection and maintenance of said poles and wires, and over and above all other costs, expenses of government or otherwise, damages, liability for damages, injury, loss or possibility of

loss, whatsoever, imposed upon said borough by reason of the existence, erection and maintenance of said poles and wires, and that said fees and charges are many times more than the cost not only of erecting and supervising the said poles and wires and issuing
36 licenses therefor, and all other ordinary or necessary expenses imposed upon the said borough thereby, but also all other extraordinary expenses of said borough, or its municipal officers, damages arising from the erection and maintenance of said poles and wires and all other costs, damages, liability for damages, loss, injury, possibility of loss of any nature whatsoever arising from the existence, erection and maintenance of said poles and wires. That said charges are in effect a tax upon the said poles and wires upon which they are so sought to be imposed and that the said ordinances are void and of no effect, because the borough of New Hope has no authority in law to impose any license fee whatsoever, and because it has no authority in law to impose a tax thereon and because the said ordinances are in conflict with that provision of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States, and because, as a police regulation, the license fees and charges sought to be imposed thereby are excessive and unreasonable.

Deponent further avers that the said defendant is subject to the laws of the Commonwealth of Pennsylvania imposing a tax upon its capital stock and upon its gross earnings within the said State, and that, in accordance therewith, it duly reports to the auditor general of said State and pays to the State treasurer all of the taxes which are imposed thereunder and thereby, being the full taxes created by the State upon the property, business and occupa-
37 tion of the said defendant owned or incurred in said State, and which said taxes amount annually to a large sum of money.

Deponent further avers that all the streets, lanes and alleys of the borough of New Hope upon which the poles and wires to recover for the license fees upon which this suit is brought are erected are post-roads of the United States. All which he avers and expects to be able to prove upon the trial of the said cause.

A. G. SAYLOR.

Sworn and subscribed to before me this 31st day of December, A. D. 1898.

[SEAL.] FRANK D. GRAHAM,
Notary Public.

Endorsement: No. 11 January term 1899. In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Co. Affidavit of defense Filed Jan'y 3rd 1899. Read & Pettit Robert M. Yardley att'ys.

Motion for Entry of a Plea.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
} No. 11, January Term, 1899. Action of Assumpsit.

March 16, 1899, plaintiff moves the entry of a plea in the above-stated case in accordance with the rule of court in such case made and provided.

WM. C. RYAN,
Att'y for Pl'ff.

Endorsement: No. 11 January term 1899 Motion for entry of plea Filed March 16th, 1899.

Action of Assumpsit.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
} No. 11, January Term, 1899. Action of Assumpsit.

March 16, 1899, plaintiff moves the entry of a plea in the above-cited case in accordance with the rule of court in such case made and provided.

BUCKS COUNTY, *ss:*

William C. Ryan being duly sworn deposes and says that he served notice of the entry of the above motion on Robert M. Yardley, Esq., attorney for the said defendant, on the sixteenth day of March, A. D. 1899, by handing him a copy thereof.

WM. C. RYAN.

Sworn and subscribed to before me this 3rd day of April, A. D. 1899.

W. F. KELLY, JR.,
Deputy Proth'y.

The prothonotary enters the plea of non-assumpsit.

W. F. KELLY, JR.

April 3rd 1899.

Endorsement: No. 11 January term 1899. The Borough of New Hope *v.* The Western Union Telegraph Company. Action of assumpsit Filed April 3rd, 1899.

Notes of Testimony.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY. } No. 11, Jan. Term, 1899. Assumpsit.

William C. Ryan, Esq., attorney for plaintiff.
Silas W. Pettit of Phila. and Robery M. Yardley for defendant.

40 Notes of testimony taken at Doylestown October 17, 1899.

Plaintiff opens.

Mr. Ryan, counsel for plaintiff, offers in evidence the ordinance book with the ordinance, as follows:

Borough Ordinance No. 10.

An ordinance for the regulation, introduction, and maintenance of telegraph, telephone, and electric light poles and wires into and in the borough of New Hope.

SECTION 1. Be it ordained and enacted by the town council of the borough of New Hope That before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric wires shall be run along, over or under any streets, lane or alley of the borough of New Hope, permission to do so shall be first obtained from the town council by the corporation firm or individual who proposes to erect such poles and run such wires, such permission to be granted by ordinance only.

SECTION 2. That all telegraph, telephone and electric light poles now erected or to be erected hereafter in the borough of New Hope which are or shall be owned or leased by any corporation firm or individual shall be designated by the names or initials of such owners or lessees, and each of said poles shall have a distinctive number, together with the name or initials of such owner or lessees, legibly marked thereon, or before the first day of October next and annually thereafter such owner or lessee shall make applica-

41 tion to the burgess for a license to maintain the poles and wires theretofore erected for the ensuing year, specifying the poles by their designation of name or initials and number as provided by this section, and wires by the streets along, over or under which they run. The burgess shall upon the production to him by the applicant of the receipt of the borough treasurer for the license fees hereinafter provided for, issue license which shall authorize the maintenance of the poles and wires designated in the application for the period of one year from that date.

SECTION 3. That for the maintenance of each and every telegraph, telephone or electric light pole within the limits of said borough of New Hope, the owner or lessee thereof shall pay to the

borough treasurer an annual license fee of one dollar, and for the maintenance of each and every mile of telegraph, telephone and electric light wire within the limits of said borough the owner or lessee thereof shall pay to the borough treasurer for the use of said borough an annual license fee of two dollars and fifty cents.

SECTION 4. That any corporation, firm or individual who shall fail to comply with the requirements of this ordinance shall be subjected to a penalty of one hundred dollars for each and every offense to be recovered in like manner as debts for penalties of like amount are recoverable.

By order of council passed and approved July 10th, 1894.

(Signed) C. C. B. JOHN, *Burgess.*

Attest: CHARLES HAIGH, *Secretary.*

42 Published and fifteen copies posted in conspicuous places.

Attest: DAVID CUNNINGHAM, *Secretary.*

It is agreed between the parties that for the year beginning October 1, 1895 there were 75 poles and 20 miles of wire, and for the three succeeding years, beginning October 1, 1896, there were 36 poles and 12 miles of wire maintained by the defendant in said borough.

Plaintiff rests.

The following witnesses were called on behalf of defendants:

WILLIAM B. GILL, sworn.

Examined by Mr. PETTIT:

Q. Mr. Gill what is your occupation.

A. Superintendent of the Western Union Telegraph Company.

Q. Of what district?

A. Known as the sixth district of the eastern division.

Q. And covers what territory?

A. Covers the territory from Jersey City to the Potomac river and around the Potomac river to the edges of West Virginia to the Allegheny mountains, over the New York State line near Elmira.

Q. How long have you been in the telegraph business.

A. I went there a messenger boy between 1862 and 1863.

Q. And you have been connected with it ever since.

A. Yes, sir.

43 Q. Have you ever built any telegraph lines?

A. Yes, sir, I have built telegraph, telephone and trolley lines, in fact have been doing it for more than 20 years I should judge.

Q. Now you know the Western Union line in the borough of New Hope?

A. Yes, sir.

Q. At present and since 1896, some time in 1896, it was testified or agreed that there were 36 poles and 12 miles of wire in that borough.

A. That is correct.

Q. In other words there was one mile of poles and 12 miles of wire line?

A. Yes.

Q. What were those wires used for?

A. I have a memorandum taken from our records showing their assignment. They were all used for through wires. They are used in New York and Philadelphia circuits. One of them used for the congressional wire between New York and Washington. One assigned to New York and Jacksonville circuit which takes the cables to Cuba. Another assigned from New York to Europe; and several assigned from New York to Baltimore and one is assigned from New York to Philadelphia exclusively for cable business, foreign cables; and the Jacksonville circuit is used largely for cables to Cuba.

44 Q. Have you any office in the borough of New Hope?

A. We have no office that we operate ourselves. The Phila. & Reading Company take in business there and transfer to us in Philadelphia, and points on our line.

Q. And these wires—does any part of the business that goes to or goes from New Hope go over these lines of wires and poles that you have spoken of?

A. None whatever.

Q. Prior to March 1896 there was a line of 40 poles, an 8-wire line of 40 poles.

A. That was the old original line that first went through New Hope built a great many years ago. The line built which old Dr. Livezey had charge of at New Hope.

Q. For what was that line used during the year 1895 from October 1895 until it was taken down?

A. That was used as a through line also. Assigned to through circuits in the same way. It was never used as a local for 1894 when Mr. Mellin had charge of it.

Q. Now in respect to the local business, that is done by the Reading Company, as I understand it?

A. Yes, sir.

Q. Do you know what that amounts to for the borough of New Hope?

A. It averages somewheres about $7 to $7.50 a month. That is for the business of course which is handed to us at Philadel-

45 phia. They retain in between themselves.

Q. Mr. Gill do you know what it costs the Western Union Company to inspect and repair its lines of telegraph, including therein the material, the new poles, the new wires and cross-arms and fixings that are used in the repair of the line for a mile of wire in your district?

A. It costs the Western Union Telegraph Company for the inspection repairs and maintenance of its plant for the last 13 years it has averaged $1.49½ per wire per annum. Some years, for instance in 1898, it only run $1.98 per mile per wire per annum, and othe

years it runs a little higher, according to the conditions of the weather.

Q. Well, then $1.50 per mile per wire per annum does that include material?

A. Yes, sir. That is what has been for 13 years.

Q. Now what does this tax amount to for a mile of wire in the borough of New Hope, you just calculate it there, you have it at a $1 a pole and $2.50 a mile a wire.

A. It amounts to $66.

Q. $66 for 12 miles of wire that would be $5.50 per mile of wire.

A. That would be $5.50 per wire per annum.

Q. You say you have built telegraph lines, you know the line in New Hope. What is that line worth.

A. The line through New Hope?

46 Q. Yes, sir. I mean new, brand-new constructed just as it is constructed put up.

A. I can tell you the value of that line, ours as well as the other companies, because I built the other company by contract. I do not recollect the exact figures what I got for it, but that line is worth $3 a pole for the poles there, and it is worth—a man taking a contract would be very glad to take the erection of them for $2.50 per pole, so that would make $5.50 a pole put up. Now to string the wire, the contract price for stringing the wire would be $3, the telegraph Co. usually can do it for $2.50 per mile per wire, so that if there is 12 wires there that would be $30 for stringing the wires; and 36 poles at $5.50 would be $198 and that would make the line worth $228.

Q. How about the cost of the wire, did you put that in?

A. No, I did not put the cost of the wire in. The wire is worth about $12 a mile, that would make $372.

Q. And the tax claimed is $66 a year.

Cross-examined by Mr. RYAN:

Q. When you refer to what the line is worth you mean the value of the poles and wires and fittings and what not that are within the corporate limits, the materials?

A. Yes. I mean a line new like replacing the present line, its value. That is it could be replaced for that money.

47 WILLIAM CUNNINGHAM, sworn.

Examined by Mr. PETTIT:

Q. Mr. Cunningham, you are the secretary of the council of New Hope, are you not?

A. Yes, sir.

Q. And you have been how long?

A. Since October 1894.

Q. Now during that time has the borough of New Hope expended any money on account of the poles and wires of the Western Union Telegraph Company?

A. No, sir.

Q. Or of the Postal Telegraph Company there?
A. No, sir.
Q. Are there any other lines of telegraph through New Hope except those two lines the Postal and the Western Union?
A. I don't know.
Q. There is a Reading line, isn't there?
A. Yes.
Q. Does that end at New Hope or go through it?
A. To the best of my knowledge it ends at New Hope.
Q. New Hope is a borough?
A. Yes, sir.
Q. Then it has a burgess, does he have any salary?
A. No, sir.
Q. Then it has their councils?
A. Seven councilmen.
Q. Do they have any salary?
48 A. No, sir.
Q. Then it has a secretary of the board, that is yourself, I suppose they pay you?
A. Yes.
Q. They have a treasurer, do they not?
A. Yes, sir.
Q. How much salary do they pay the treasurer?
A. $20 a year. They pay the secretary $30 a year.
Q. Then there is a constable elected in the borough, isn't there?
A. Yes, sir.
Q. Does he get paid any salary by the borough?
A. No salary. He does police services during holidays. When the burgess sees fit to appoint a policeman he often calls on the constable and he gets paid for doing that.
Q. How much does he get paid for that?
A. Most of the time $2.50 a day.
Q. Now are there any other expenses of the borough government except those that you have mentioned for carrying on the government there besides the salaries of the officers?
A. That is all. The assessor is paid for his services, borough assessment.

Cross-examined by Mr. RYAN:

Q. Are the several sums named by you the only amounts that are paid for borough purposes during the year? Do you spend anything on streets?
49 A. Only what is done by the street commissioner, by the day, no regular salary.
Q. You do pay him for his services?
A. Yes.
Q. Do you ever buy material for the streets?
A. Yes, sir.
Q. What would that amount to in a year?
A. I could not say.

Q. Do you light the borough?
A. Yes.
Q. Who pays for that?
A. It is paid out of the taxes of the borough funds.
Q. How much does that cost a year?
A. $10.50 a year for a lamp, and there are 34 lamps.
Q. About what do the gross expenditures of the borough run a year, including all these amounts you have named?
A. I would have to refer to the borough statements. The minutes there tells what it is.
Q. You have already identified this book. This is the borough minute book, and what I show you is the borough statement for the year ending March 21, 1899.
A. Yes, sir.
Q. This shows disbursements on the part of the borough to what amount?
A. $4088.61.
Q. They paid some of that to a bank which they owed, 50 didn't they?
A. Yes.

The minute book, containing the borough statement, is offered in evidence.

"To the burgess and council of New Hope borough:

Your finance committee would offer the following report of receipts and disbursements for the year ending March 21st, 1899.

Receipts.

Received on 1896 duplicate	$2.75
" " 1897 "	52.40
" " 1898 "	810.73
" from Lambertville national bank	2870.38
" " burgess for fines	10.00
" " county treasurer, license fees	228.00
" " former treasurer	148.27
Total	$4122.53

Bond Account.

Received on 1896 duplicate	$.85
" " 1897 "	17.46
" " 1898 "	270.23
" from former treasurer	413.24
Total	$701.78

51 *Firemen's Relief Fund.*

Received from auditor general of Pennsylvania	$2.32
" " former treasurer	1.52
Total	$3.84

Expenses for the year were as follows:

Repairing streets	$662.37
Maintenance of poor	25.90
Street lamps	340.90
Borough assessments	20.00
Auditor's services	2.00
Physician's "	40.00
Secretary's "	30.00
Treasurer's "	20.00
Overseer of poor services	10.00
Police services	4.00
Attorney's services	64.00
Removing garbage	70.00
Incidental expenses	25.36
Expanding tools for Eagle Fire Company	10.35
Cleaning and repairing town hall	34.23
Printing for board of health	29.50
Total	$1388.61

Disbursements.

Amount paid on borough orders	$1388.61
" " Lambertville national bank	2700.00
	$4088.61

52 *Bond Account.*

Amount paid—interest on bonds	$126.00
" " bonds redeemed Nos. 16, 17, 18, 19	400.00
" " State tax on bonds	10.40
	$536.40

Assets of Borough.

Uncollected on 1897 duplicate	$23.58
" " 1898 "	201.08
Balance in treasurer's hands, borough purposes	33.92
" " " " on bond account	165.38
Firemen's relief fund	3.84
	$427.80

Indebtedness of Borough.

Bonds unpaid	$2600.00
Lambertville national bank, notes	800.00
Total	$3400.00

Respectfully submitted.

R. C. FOULKE,
T. N. RYAN
CHARLES ROBERTS,
Finance Committee."

THOMAS O'ROURKE sworn.

Examined by Mr. PETTIT:

Q. What is your occupation?
A. Lineman.
Q. For what company?
53 A. Postal.
Q. Where are you stationed?
A. New Hope, Pa.
Q. What lines of telegraph are there in New Hope?
A. Western Union and Postal.
Q. How about the Reading?
A. And the Reading, that comes in on the railroad.
Q. Does it end at New Hope or go on beyond it?
A. Ends at New Hope.
Q. Then it has no poles or wires on streets?
A. No, sir.
Q. How long have you been lineman of the Postal Telegraph Company there?
A. Since 1882.
Q. You are familiar with the position and location of all the telegraph poles and wires in the borough are you not?
A. Yes, sir.
Q. During all that time did the borough ever do anything in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies?
A. Not to my knowledge.

Cross-examined.

No questions.

Mr. Pettit, of counsel for defendant, offers in evidence the certified copy of the charter of the Western Union Telegraph
54 Company granted by the laws of the State of New York; and especially the act of April 4th, 1856 changing the name to the Western Union Telegraph Company. Also, the certificate of the then Postmaster General of the United States dated June 30, 1884 that the Western Union Telegraph Company had accepted the provisions of the act of Congress entitled An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes, approved July 24, 1866.

Mr. Pettit, on behalf of defendant, asks that the plaintiff admit that the annual license fee imposed upon the Postal telegraph by the borough of New Hope amounts to $138 a year.

Mr. Ryan, counsel for plaintiff, objects on the ground that it is irrelevant. The objection is sustained, to which ruling of the court the defendant excepts.

Both sides close.

Charge to Jury by Judge Yerkes.

GENTLEMEN OF THE JURY: This is a case wherein The Borough of New Hope, a municipal corporation of this county, has sued The Western Union Telegraph Company to recover a sum of money levied as a license upon its poles and wires within the borough of New Hope. A municipal corporation such as is the borough of New Hope has a right under the law to impose a license for the privileges conferred or exercised within its boundaries, as a
55 regulation of its police system; that is, for the purposes of maintaining good order, peace and the protection of the lives and property of its citizens, and the safety of persons travelling through its streets. A license regulation must, however, have its limits. It cannot be carried to the extent of being oppressive, excessive and unreasonable upon the subject with which it treats. If it does it is void and may be set aside and disregarded. It has been held to be the law that in the matter of a license as a police regulation it must be limited to the necessary expense of granting the license, of regulating the subject-matter of it, and of the danger or liability which may arise as a consequence of its existence. For instance, our supreme court has said that in the case of these poles it is the duty of the borough to provide against their falling down, against injury which may arise from them as a consequence of their erection, and the probable and reasonable expense and liability to which the municipality may be subjected, not in one year, but on any occasion, so near as it can be approximated is the proper basis for a license fee or police regulation. But beyond that the municipality cannot go; because then it is not levying the tax or payment, the collection of which is merely for the purposes of regulating and maintaining a police supervision but it is taking the property of another not liable to taxation for public use; outside of the duty imposed upon every person or corporation who goes into a municipality to be held liable, rea-
56 sonably liable, for the consequences of their occupation of its streets. It has been said by one of the judges of our supreme court that there is no power to take the money or property of another for public purposes, excepting it be that of taxation or of eminent domain. And under our laws the power to tax a corporation such as this telegraph line is, as a matter of revenue, does not exist, but is confined to that of a license, as I have defined it to you.

The question which arises in this case it is said is more properly one for the court, and would be exclusively for the court if it came here upon evidence asserted through an affidavit of defense, or of a documentary character. But the court proposes in this case to submit to you the question whether under these rules and regulations the amount of license fee imposed here is reasonable and proper; whether it exceeds under all the circumstances what may be the necessary, the probable, or the expectant liability and expense of the borough of New Hope for the issuing

of these licenses regulating the location of these lines and poles, seeing to their safe maintenance so as to protect the public and its citizens from injury, and to render them safe and free from being a nuisance upon the streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case, it cannot be, and I do
57 not understand why that should be a question exclusively for the court, more properly than one partly of fact for the jury. If the charge is unwarranted, if it is arbitrary, if it is an exaction in the shape of a tax for the purpose of collecting money for the revenue of the borough in other respects and to maintain its government outside of the regulation of the property of this defendant, then it is illegal and cannot be collected.

Now then, gentlemen, we submit this question to you, and as you shall find, your verdict will be for the plaintiff or defendant. The amounts in dispute here, the amount claimed, is embodied in a statement made by the counsel, but does not establish that this is a reasonable charge or license, it only establishes that that is the claim.

The following points have been submitted to me:

1. It appears from the uncontradicted evidence in this case that the poles and wires in the borough of New Hope to recover for the charges upon which this suit is brought form a part of the system of poles and wires of the defendant company extending into and through the other States and Territories of the United States, over and along the system of poles and wires (including therein the said poles and wires in the borough of New Hope) communication by electricity is carried on and messages transmitted by said defendant company to and from citizens from other States, and to and from such citizens of other States from and to citizens of the State of
58 Pennsylvania, which said business is commerce between the States within the meaning of the Constitution of the United States; therefore the borough of New Hope has no right to impose any charge for the privilege of erecting and maintaining said poles and wires in said borough except only such sum as will reasonably cover and reimburse to it the expense to which it may be subjected in consequence of the erection and maintenance of said poles and wires, and if the license fees sued for in this case exceed said sum your verdict should be for the defendant.

Affirmed.

2. It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and wires the ordinance of the said borough of July 10th, 1894, sued on in this case is void and the verdict of the jury should be for the defendant.

Refused.

3. Evidence in this case shows that the amount of license fee sought to be imposed upon the defendant is excessive in amount

and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant.

Refused.

4. Under the evidence in this case the verdict of the jury should be for the defendant.

59 Refused.

October 17, 1899, before verdict the defendant excepts to the answers to points of law and the charge of the court and requests that the same may be reduced to writing and filed, and that a bill be sealed which is now done.

HARMAN YERKES,
President Judge. [SEAL.]

Endorsement: In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Company. No. 11 Jan. T. 1899. Assumpsit. Notes of testimony Filed October 27, 1899.

Motion and Reasons for New Trial.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE
v.
THE WESTERN UNION TELEGRAPH COMPANY.
No. 11, January Term, 1899.
Assumpsit.

Now October 19, 1899 the defendant by its attorney- Read and Pettit and Robert M. Yardley respectfully move- the court for a new trial in the above-stated case, and assign- the following reasons therefor:

60 1st. The court erred in not instructing the jury as requested by the defendant in its first written point submitted to the court for instruction.

2nd. The court erred in not instructing the jury as requested by the defendant in its second written point submitted to the court for instruction.

3rd. The court erred in not instructing the jury as requested by the defendant in its third written point submitted to the court for instruction.

4th. The court erred in not instructing the jury as requested by the defendant in the fourth written point submitted to the court for instruction.

ROBERT M. YARDLEY,
Att'y for Defendant.

Endorsement: No. 11 January term 1899. The Borough of New Hope *v.* The Western Union Telegraph Company. Motion and reasons for new trial. Filed October 19, 1899. Read and Pettit. Robert M. Yardley.

Opinion of the Court.

In the Court of Common Pleas of Bucks County.

THE BOROUGH OF NEW HOPE *v.* THE WESTERN UNION TELEGRAPH Company.	No. 11, Jan. T., 1899. Action of Assumpsit.

61 Sur motion and rule for a new trial.

Opinion of the Court.

The plaintiff, through ordinance regularly adopted, imposed a license fee upon the defendant of one dollar for each pole erected within the borough limits, and of two dollars and fifty cents for each mile of wire maintained therein. The affidavit of defense embraced the usual question of reasonableness of the license, and the right of plaintiff to interfere with interstate commerce, by taxation of the business of a corporation engaged in the same.

There was no motion for judgment for want of a sufficient affidavit of defense. After the cause was at issue it came regularly upon the trial list, and a jury was impanelled to try it. The result was a verdict for plaintiff. Several requests were presented to the court, by the defendant, all of which, excepting the first, asked for binding instructions to return a verdict in favor of defendant on the ground that the ordinance was unreasonable and oppressive.

We asked the jury to pass upon the question of the unreasonableness of the license fee, upon the facts as applied to what we considered a fair definition of what constitutes a license and the power to impose the same.

It is intimated that we were inconsistent, in submitting to the jury a question which it is the province of the court to determine.

To a degree this is true, though the wisdom of the rule that
62 the question of the unreasonableness of a borough ordinance in cases of this character, should not be submitted to the jury under proper instructions, may well be doubted.

But the defendant has no ground to complain, provided the court reserves to itself to finally determine the question, and does so before the judgment becomes conclusive. By the first point which was affirmed, the court was asked to submit the question to the jury, with the result that they found for the plaintiff. Under the rule of law as adopted by the courts, notwithstanding any conclusion the jury may have reached, the court, whether exercising its usual power to review a mistaken action of the jury or to determine the question for itself, must now pass upon the validity of the ordinance and, if we conclude binding instructions as prayed for should have been given, must grant a new trial. If on the other hand the instructions should have been in favor of plaintiff, the defendant cannot complain that the question was given to the jury.

In determining this point the exercise of our discretion and judgment cannot be individual, but must be judicial, and be governed by the opinions of our superiors. I may individually consider the rate of license exorbitant, and robbery under the forms of law, but respect for the law compels acquiescence to the *stare decisis* of the higher courts.

The determination of the reasonableness of the amount of the license tax lies, in the first instance, in the discretion of the
63 borough council. The court cannot determine whether the amount is reasonable, but rather whether it is so unreasonable as to show an abuse of discretion by the borough council. W. U. T. Co. 148 Pa. 117. North Braddock Borough *v.* Traction Co., 8 Pa. Superior Ct. 233. North Braddock Borough *v.* Telegraph Co., 11 Superior Ct. 24. Kittanning Light Heat & Power Co., *ibid.* 31.

Under facts scarcely distinguishable from those now being considered the supreme court and superior court have declared, that, a similar amount of license fee, and one equally disproportionate as this to the expenses incurred, in maintaining the police regulations, is not an unreasonable exercise of discretion by the borough authorities. In the two last cases, reported in 11 Superior Court Reports, the fee was precisely the same for poles and wires as here, and in both, the superior court refused to find an abuse of discretion. While the facts are not precisely alike, we fail to find such a difference as would warrant us in flying into the teeth of those cases. We are in duty bound to follow precedents. If this be a case such as in Braddock Borough *v.* Telegraph Company, Judge Porter says demonstrates an abuse of discretion, it is proper that the superior court should be the first to so declare, in view of the unanimity of prior decisions.

And now, to wit, February 26, 1900, the rule for a new trial is discharged and judgment for plaintiff.

By the court.

HARMAN YERKES,
President Judge.

64 Endorsement: In the court of common pleas of Bucks county. The Borough of New Hope *v.* The Western Union Telegraph Company. No. 11 Jan. T. 1899. Action of assumpsit. Sur motion and rule for a new trial. Opinion of the court. Filed Feb'y 26th, 1900.

Rule on the Appellee to Appear and Plead on the Return Day of the Writ.

The Superior Court of Pennsylvania, Sitting at Philadelphia, *ss:*

[SEAL.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Bucks, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of the Western Union Telegraph Company from the judgment in No. 11 January term 1899 wherein The Borough of New Hope was plaintiff and the said appellant was defendant before you, or some of you, defending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our superior court of Pennsylvania, at a superior court to be holden at Philadelphia, the third Monday of November next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

65 Witness the Honorable Charles E. Rice, doctor of laws, president judge of our said superior court at Philadelphia, the 24th day of April in the year of our Lord one thousand nine hundred.

CHAS. S. GREENE,
Prothonotary.

I certify that William B. Gill, of the city of Philadelphia is surety in the within case, in the sum of eight hundred dollars.

EMIL W. HARING,
[SEAL.] *Prothonotary.*

To the honorable the judges of the superior court of the Commonwealth of Pennsylvania, sitting at Philadelphia:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

HARMAN YERKES, [L. S.]
Pres't Judge.

Endorsement: 11 Jan'y term 1899 C. P. Bucks. No. 101 October term 1900. Superior court. The Borough of New Hope *v.* The Western Union Telegraph Company, appellant. Certiorari to the court of common pleas for the county of Bucks. Returnable the third Monday of November, 1900. Rule on the appellee to appear and plead on the return day of the writ. Received and filed April 26th, 1900. Filed Jul- 26, 1900. In the superior court. Robert M. Yardley, Read & Pettit.

66 *Assignments of Error.*

Superior Court, October Term, 1900.

THE BOROUGH OF NEW HOPE
v.
WESTERN UNION TELEGRAPH CO., Appellant. } No. 101.

And now, to wit, this twenty-eighth day of September, A. D. 1900, the appellant files its assignments of error in the above cause and assigns as error therein the following to wit:

I. The learned judge who tried the cause erred in charging the jury as follows:

"A municipal corporation, such as is the borough of New Hope, has a right under the law to impose a license for the privileges conferred or exercised within its boundaries as a regulation of its police system; that is for the purpose of maintaining good order, peace and the protection of the lives and property of its citizens, and the safety of persons travelling through its streets."

II. The learned judge who tried the cause erred in charging the jury as follows:

"It has been held to be the law that in the matter of a license as a police regulation it must be limited to the necessary expense of granting the license, of regulating the subject-matter of it and of the danger or liability which may arise as a consequence of its existence."

67 III. The learned judge who tried the cause erred in charging the jury as follows:

"For instance, our supreme court has said, that in the case of these poles, it is the duty of the borough to provide against their falling down, against injury which may arise from them as a consequence of their erection and the probable and reasonable expense and liability to which the municipality may be subjected, not in any one year, but on any occasion so near as it can be approximated, is the proper basis for a license fee or police regulation."

IV. That the learned judge who tried the cause erred in charging the jury as follows:

"But the court proposes in this case to submit to you the question, whether under these rules and regulations the amount of license fee imposed here is reasonable and proper; whether it exceeds under all the circumstances what may be the necessary, the probable or the expectant liability and expense of the borough of New Hope, for the issuing of these licenses, regulating the location of these lines and poles; seeing to their safe maintenance, so as to protect the public and its citizens from injury and to render them safe and free from being a nuisance upon their streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case,

68 it cannot be and I do not understand why that should be a

question exclusively for the court more properly than one partly of fact for the jury."

V. That the learned judge who tried the cause erred in refusing the second point submitted by the said defendant, which said second point was as follows:

"It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and wires, the ordinance of the said borough of July 10, 1894, sued on in this cause, is void, and the verdict of the jury should be for the defendant."

The answer to the said point being as follows:

"Refused."

VI. That the learned judge who tried the cause erred in refusing the third point submitted by the said defendant, which said third point was as follows:

"The evidence in this case shows that the amount of license fee sought to be imposed upon defendant is excessive in amount and the ordinance of the plaintiff is therefore illegal and void and the verdict must be for the defendant."

The answer to the said point being as follows:

"Refused."

69 VII. That the learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which said point was as follows:

"Under the evidence in this case the verdict of the jury should be for the defendant."

The answer of the learned judge thereto being as follows:

"Refused."

READ & PETTIT,
Att'ys for Appellant.

Endorsement: Superior court October term 1900. No. 101. The Borough of New Hope *v.* Western Union Telegraph Company, appellant. Assignments of error. Siled Sep. 27, 1900. In the superior court. Read & Pettit.

Opinion of the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE *v.* WESTERN UNION TELEGRAPH CO. } No. 101, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks Co.

Filed Feb. 14, 1901.

Per Curiam:

70 It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and main-

tained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities: W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C. 39; S. C. 11 Cent. Rep. 102; Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Chester *v.* P. T. & P. Tel. Co., 148 Pa. 120; Chester *v.* W. U. Tel. Co., 154 Pa. 466; Philadelphia *v.* Am. Union Tel. Co., 167 Pa. 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct. 620; North Braddock *v.* Central etc. Tel. Co., 11 Pa. Superior Ct. 24; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct. 31. See also McKeesport
71 *v.* McKeesport, etc. R'y Co., 2 Pa. Superior Ct. 242; North Braddock *v* Second Av. Tr. Co., 8 Pa. Superior Ct. 233; Lansdowne *v.* Delaware, etc., Electric R'y Co., 9 Pa. Superior Ct. 621, and Taylor *v.* C. P. Tel., etc. Co., 8 Pa. Dist. Rep. 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being undisputed, we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

72 UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the superior court of Pennsylvania, sitting at Philadelphia, do hereby certify that the foregoing record, pages 1 to 72 inclusive is a true and faithful copy of the record and proceedings of the superior court of the State of Pennsylvania, sitting at Philadelphia, in a certain suit therein pending wherein The Western Union Telegraph Company was appellant, and The Borough of New Hope was appellee.

Seal of the Superior Court of Pennsylvania.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said superior court of the State of Pennsylvania, sitting at Philadelphia, at Philadelphia, the 17th day of May, 1901, and in the one hundred and twenty-fifth year of the Independence of the United States.

CHAS. S. GREENE,
Prothonotary of the Superior Court of Pennsylvania, Sitting at Philadelphia.

{ Ten-cent U. S. internal revenue stamp, canceled 5, 17, 1901. C. S. G. }

73 I, Charles E. Rice president judge of the superior court of Pennsylvania, do hereby certify, that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said superior court of Pennsylvania, sitting at Philadelphia, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 17th day of May one thousand nine hundred and one.

CHARLES E. RICE,
Pres'd't Judge.

I, Charles S. Greene, prothonotary of the superior court of Pennsylvania, sitting at Philadelphia, do certify, that the Honorable Charles E. Rice by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, president judge of the superior court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said superior court of Pennsylvania, sitting at Philadelphia, this 17th day of May one thousand nine hundred and one.

[Seal of the Superior Court of Pennsylvania.]

CHAS. S. GREENE.

{ Ten-cent U. S. internal revenue stamp, canceled 5, 17, 1901. C. S. G. }

74 Supreme Court of United States, October Term, 1901.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE BOROUGH OF NEW HOPE, Defendant in Error. } No. —.

And now, to wit, this 13th day of May 1901, the plaintiff in error files its assignments of error in the above cause, and assigns for error as follows:

I. The learned judge who tried the cause erred in charging the jury as follows:—

"A municipal corporation, such as is the Borough of New Hope, has a right under the law to impose a license for the privileges conferred or exercised within its boundaries as a regulation of its police system; that is for the purposes of maintaining good order, peace and the protection of the lives and property of its citizens, and the safety of persons traveling through its streets."

II. The learned judge who tried the cause erred in charging the jury as follows:—

"It has been held to be the law that in the matter of a license as a police regulation it must be limited to the necessary expense of granting the license, of regulating the subject-matter of it, and of the danger or liability which may arise as a consequence of its existence."

III. The learned judge who tried the cause erred in charging the jury as follows:—

"For instance, our supreme court has said, that in the case of these poles, it is the duty of the borough to provide against their falling down, against injury which may arise from them as a consequence of their erection and the probable and reasonable expense and liability to which the municipality may be subjected, not in any one year, but on any occasion so near as it can be approximated is the proper basis for a license fee or police regulation."

IV. That the learned judge who tried the cause erred in charging the jury as follows:—

75 "But the court proposes in this case to submit to you the question, whether under these rules and regulations the amount of license fee imposed here is reasonable and proper, whether it exceeds under all the circumstances what may be the necessary the probable, or the expectant liability and expense of the borough of New Hope for the issuing of these licenses, regulating the location of these lines, and poles; seeing to their safe maintenance, so as to protect the public and its citizens from injury and to render them safe and free from being a nuisance upon their streets. If it is a reasonable charge for such purpose and can be justified upon that ground, then this ordinance can be enforced and the plaintiff can recover; but if it is unreasonable, unjustifiable by the facts of the case, it cannot be and I do not understand why that should be a question exclusively for the court more properly than one partly of fact for the jury."

V. That the learned judge who tried the cause erred in refusing the second point submitted by the said defendant, which said second point was as follows:—

"It appears from the uncontradicted evidence in this case that no costs or expenses are imposed upon the borough of New Hope in consequence of the erection and maintenance of the poles and wires of the defendant company, and as said borough is without power to exact any charge for the maintenance of said telegraph poles and wires, the ordinance of the said borough of July 10th, 1894, sued on in this cause, is void, and the verdict of the jury should be for the defendant."

The answer to the said point being as follows:—

"Refused."

VI. That the learned judge who tried the cause erred in refusing the third point submitted by the said defendant, which said third point was as follows:—

"The evidence in this case shows that the amount of license fee sought to be imposed upon defendant is excessive in amount, and the ordinance of the plaintiff is therefore illegal and void, and the verdict must be for the defendant."

The answer to the said point being as follows:—

"Refused."

VII. That the learned judge who tried the cause erred in refusing the fourth point submitted by the said defendant, which said point was as follows:—

"Under the evidence in this case the verdict of the jury should be for the defendant."

The answer of the learned judge thereto being as follows:—

"Refused."

76 VIII. The learned superior court of Pennsylvania erred in ruling as follows:

"It has been decided, first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits, is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision or police surveillance of the poles and wires in that year, is not a defense; fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities."

IX. That the learned superior court of Pennsylvania erred in ruling as follows:

"In many of the foregoing cases the license fee was the same as

that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void."

JOHN R. READ,
SILAS W. PETTIT,
H. B. GILL,
Attorneys for Western Union Telegraph Company,
Plaintiff in Error.

77 [Endorsed:] Supreme Court of the United States October term 1901 No. — The Western Union Telegraph Company plaintiff in error *vs.* The Borough of New Hope defendant in error Assignments of error. John R. Read. Silas W. Pettit. H. B. Gill.

Endorsed on cover: File No. 18,173. Pennsylvania superior court. Term No. 101. The Western Union Telegraph Company, plaintiff in error *vs.* The Borough of New Hope. Filed May 20th, 1901.